No. 20426

In the

United States Court of Appeals

For the Ninth Circuit

THOMAS T. COHEN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the District of Arizona

Brief for Appellants

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JURISDICTIONAL STATEMENT

The appellant, Thomas T. Cohen, was found guilty on March 17, 1965 by a jury, of ten counts of mail fraud, Sec. 1341, Title 18 U.S.C., and one count of using a fictitious name in support of the scheme to defraud, Sec. 1342, Title 18, U.S.C. Timely motions for a judgment of acquittal and for a new trial were filed. Same were denied on May 17, 1965, at which time the Court sentenced the appellant to two years each on Counts 1, 2, 3, 4, 5, 6, 7, 9, 10, 11 and 12 (count 8 having been dismissed), the sentences to run concurrently. The Court also ordered the defendant to be eligible for parole pursuant to Title 18, U.S. Code, Section 4208A (2).

The matter is before this Court pursuant to Title 28, U.S. Code, Section 1291.

STATEMENT OF THE CASE

The indictment No. 16986 in the present case was returned on September 9, 1964, and the arraignment was in Phoenix on October 6, 1965. *(TR 1A, P. 197), charging the defendant with eleven counts of mail fraud, and one count of using a false and fictitious name.

This indictment is the same as was returned in Cause No. 16545 (TR Vol. 1, P's. 1-5). The indictment in Cause No. 16545 was filed on February 27, 1963 (TR Vol. 1, P. 74) and the Bench warrant of arrest was issue on the same day. (TR Vol. 1, P. 74). The Warrant was received by the United States Marshal for the Southern District of Florida on March 4, 1963 and executed by that Marshal on November 8, 1964 (TR Vol. 1, P. 74). When the indictment in No. 16545 was filed and at the time the Warrant was received by the U. S. Marshal for the Southern District of Florida, the defendant was already in custody in that same district awaiting trial on other Federal charges, pending in that district (TR 1, P's. 30-31) (T of T† July 27, 1965, P. 22, P. 26). Thus the defendant was in federal custody at the time the Marshal received the Warrant in the very same district where the Warrant was received. Yet, he was not arrested, arraigned, served, or otherwise notified of the charges against him from March 4, 1963 until November 8, 1963, which by *coincidence?* is the day the last of the three

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*TR refers to Transcript of Record.

†T of T of July 27, 28, refers to the Transcript of testimony and argument before Judge Mathes on the motion to dismiss for lack of speedy trial.

indictments in that district was dismissed by the Court. (T of T July 28, 1964, P's. 33 through 35).

The defendant was arraigned on December 30, 1963 and entered a plea of not guilty to all counts (TR Vol. 1, P. 74). On January 25, 1964, a timely motion to dismiss the indictment for lack of speedy trial was made on behalf of the defendant (TR Vol. 1, P. 74). A hearing was held pursuant to this motion on July 27, 1964. (TR Vol. 1, P. 74, 75).

The Court found that the action of the government offended every sense of the right to a speedy trial under the Sixth Amendment (T of T July 28, 1964, P. 37) and the Court, after having heard of the defendant's detention by federal authorities for 18 months without ever standing trial (T of T July 27, 1964, P. 24) and the other circumstances of the defendant's plight stated "It savors of Russia to me" (T of T July 28, 1964) dismissed the indictment (T of R, Vol. 1, P. 72 and 73).

Shortly thereafter, in September of 1964, the Grand Jury for the District of Arizona returned the exact same indictment, which was now numbered 16986 (TR 1, P's. 77-91). A timely motion to dismiss with prejudice was filed on the grounds that the dismissal of the indictment in No. 16545 was a bar to the prosecution of this indictment (TR 1-92). The government filed a memorandum in opposition thereto (TR 1-100) and on December 14, 1964 the Court entered an order denying the motion to dismiss with prejudice (TR 1-103) apparently because the defendant failed to show how he was prejudiced (TR 1-104) and because Judge Craig interpreted Judge Mathes order to be based on the Government's failure to prosecute (TR 1-104) rather than on a violation of a right to a speedy trial pursuant to the Sixth Amendment.

The cause proceeded to trial on March 9, 1965.

The indictment is quite lengthy (TR 1-77-91) and charges essentially the defendant with a scheme to defraud by use of the mails (TR 1-77); that certain corporations would be formed (TR 1-79); that the defendant would use the name Al Sherman (TR 1-79) and certain land would be subdivided and purchased (TR 1-80). Although other matters are charged the gist of the indictment is that certain fraudulent representations would be made to induce people to accept the lots (TR 1-83).

The alleged misrepresentations concerned the nature, condition, geography, topography and availability of the land (TR 1-83-84).

The government had well over 25 witnesses testify that the representations were made as alleged in the indictment by certain persons other than the defendant who were associated with the corporations named in the indictment. Some of these were Crawford * (P. 654), Bird (662), Younger (582), Papadapolous (544), Nelson (530), Sievertson (368), Marsh (376), Abrams (382). The government introduced several witnesses to show that the representations were not true (758-62, 762-767, 768 through 776). Perhaps the strongest government witness to show that the representations made to the people who were acquiring the land were false was the government witness Kimber (766-785 and 787-808) who testified the land unavailable, uninhabited, and impassable.

The government attempted to tie these various representations to the defendant by only a few witnesses. The first was Pinkerton who testified he worked for the defendant (191) and the defendant told him what to tell the customers (231-234). Pinkerton's testimony was severely im-

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*Numbers standing alone refer to page numbers in the transcript of the testimony at the trial.

peached (258-267; 271-276). The witnesses Opalek (314-321) Brandon (498-499) and Boyer (605-621) testified in substance that the defendant was present when some of the representations were made. The witness Saunders gave some corroboration to Pinkerton's testimony which was also impeached (519, 355-368). There was no testimony that the defendant knew the representations were false.

On the contrary, if he did make any representations, he was only repeating what he had been told about the land by Hermanson who sold it to him (858-890, and more particularly 872, 873, 890, 891).

The defendant did not take the stand.

There was not a Court Reporter in Chambers. The government first offered an instruction concerning the defendant being a competent witness, but since the defendant did not take the stand the instruction was withdrawn (TR A1 P. 171).

There was, however, a discussion in Chambers concerning an instruction to the jury covering the defendant's failure to take the stand (1283).

While Government Counsel was arguing defense Counsel passed a note to the Court (Court Ex No. 7) to be certain that the Court would give the proper instruction on the defendant's failure to take the stand.

The Court indicated to Defense Counsel that the Court would take care of it (1285, 1286). After the Court indicated to Counsel that the proper instruction would be given, the Court read the instructions to the Jury (1237-1274). At the conclusion of the reading of the instructions the Court again inquired if Counsel had any further instructions (1274).

Defense Counsel now for the second time in open Court reminded the Court about the instruction (1274). Govern-

ment Counsel also inquired about the instruction concerning the failure of the defendant to take the stand. The record clearly shows the instruction was not given (1275, 1277, 1278).

Although the record may be somewhat confusing, the Court was well aware that Defense Counsel repeatedly requested the Court to give the proper instruction on the defendant's failure to take the stand (1278).

The Court was of the opinion it was covered, but it was not (1278). The Court merely stated that "The Law does not impose upon a defendant the duty of producing any evidence, including his own testimony" which was merely added to that part of the usual instruction on burden of proof (1261) (TR 1A 139). There was no instruction given or any form thereof that the Law does not compel the defendant to take the witness stand and testify, and no presumption of guilt may be raised and no inference of any kind may be drawn from the failure of the defendant to testify (1283) (Court Ex No. 7). The Court was of the opinion it was covered (1285-1286 and 1287).

SPECIFICATIONS OF ERROR

1. The Trial Court erred when it denied the motion to dismiss the indictment for the reasons that the prior dismissal based upon a violation of the speedy trial clause of the Sixth Amendment operated as a bar to the present prosecution.

2. The Trial Court erred when it failed and refused to instruct the jury that the law does not compel a defendant to take the witness stand and testify, and no presumption of guilt may be raised and no inference of any kind may be drawn by the failure of the defendant to testify.

ARGUMENT

I. The Court Erred in Not Dismissing the Indictment With Prejudice Because the Dismissal of the First Indictment Barred the Filing of the Second Indictment

The order of July 28, 1964, found that the defendant was in the custody of the United States from June 13, 1962 until November 8, 1963 awaiting trial on indictments not connected with this case; which were pending in the Federal District Court for the Southern District of Florida.

The indictment in Cause No. 16545 was filed with the clerk of this Court on February 27, 1963. The appellant was arrested on this charge November 8, 1963 and the file warrant was returned executed on December 11, 1963. (TR 1-73) The defendant was not arraigned until the last week of December, 1963 (TR 1-104). The appellant is protected by his constitutional right to a speedy trial, even though the delay was caused by the imprisonment of the appellant for another offense, in the absence of the showing of reasonable effort by the Government to obtain defendant's return for trial, *Taylor v. United States*, 238 F.2d 259 (C.A.D.C. 1956.)

In the *Taylor* case the defendant had been serving a sentence in a penitentiary of New York until he was returned to the District of Columbia for trial. The Court said at page 201, *Taylor supra*

> "The Government urges that the delay in bringing appellant to trial was his fault, since it was caused by his imprisonment in New York. We think his imprisonment there does not excuse the Government's long delay in bringing him to trial here, in the absence of a showing that the Government, at a reasonably early date, sought and was unable to obtain his return for trial. It does not appear that the Government made any such effort before its' successful effort in 1956, though the crime was committed in 1950 and the indictment returned in 1954."

In the case at bar, the Government made no effort for eight months until all of the indictments were dismissed in Florida, then on the day the last indictment was dismissed they served the Warrant in the district where he had been held for at least eight months prior to the arrest of the defendant while the defendant was in custody of the Marshal. The Court in *Taylor* went on to say:

> "In this case, however, as stated, there is no showing that appellant even knew he was indicted and entitled to a trial."

The above quote is exactly applicable to the case at bar, because here some eight months after the Warrant had been forwarded to the Southern District of Florida where the defendant was being held on other charges until it was served in November, 1963; the appellant in this case had no idea that there were charges pending against him in another district even though he was in Federal custody at the time. It has long been the law that an accused cannot be denied speedy trial because he is serving sentence on another conviction. *Frankel v. Woodrough* 7 F.2d 796 (C.A.8 1925)

In the present case the defendant was not even serving a sentence for any crime for which he had been convicted, but rather was awaiting trial on other charges, all of which were ultimately dismissed (TR 1-72). In *Frankel supra* the Court said at page 798:

> "The question before us has been before several of the State Courts. The great weight of authority is that imprisonment under sentence does not suspend the right to speedy trial but that either the State or the convict can insist thereon . . . From the standpoint of the accused, the logic of this view is well expressed in *State vs. Keefe,* 17 Wyo. 227, 98 Pacific 122, . . .

> "The right of a speedy trial is granted by the Constitution to every accused. A convict does not accept it, he is not only amenable to the law but is under its protection as well. *No reason is perceived for depriving him of the right granted generally to accused persons, and thus in effect, inflict upon him an additional punishment for the offense of which he has been convicted.*" (Emphasis added.)

This language is equally applicable to the facts in the present case. Should the appellant here be penalized of his rights to a speedy trial merely because he was awaiting charges in another district? Our position is, certainly not!

In the case presently on appeal, there was not even a conviction, but rather eighteen months of imprisonment awaiting trial on three other charges which were dismissed (TR 1-72).

> "At the time of the defendants trial upon the one information he was under the protection of the guarantee of a speedy trial as to the other. It cannot be reasonably maintained we think, that the guarantee became lost to him upon his conviction and sentence or his removal to the penitentiary, *Frankel supra* at 798."

It is the appellant's position in this case, that he maintained at all times his rights to a speedy trial and that they were not lost merely because he was awaiting trial in another district. The trial court found that the defendant was in the custody of the United States for a period of at least nine months while this indictment was pending and was denied an opportunity to prepare his case and have the right to a speedy trial, and the court further found that the defendant had been deprived of his right to a speedy trial pursuant to the Sixth Amendment of the Constitution of the United States (TR 1-73).

Rule 48(b) of the Federal Rules of Criminal Procedure merely butresses and codifies in the form of a rule the rights to a speedy trial pursuant to the Sixth Amendment.

> "In 1944, the Supreme Court adopted the Federal Rules of Criminal Procedure. Rule 48 deals with 'Dismissal'; subdivision (b) of that rule is as follows: '(b) By Court. If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint'."
>
> "The note by the Advisory Committee on Rules to subdivision (b) was terse: This rule is a restatement of the inherent power of the court to dismiss a case for want of prosecution. Ex parte *Altman,* 34 F.Supp. 106, [D.C.] S.D. Cal."
>
> "Rule 48(b) has the same effect in implementing the Sixth Amendment as an Act of Congress would have had. Thus, rule 48 merely implements and gives guide lines to the Court for enforcing the Sixth Amendment, *Petition of Provoo* 17 F.R.D. 183, 199-200."

Rule 48(b) is merely a contemporary enunciation of the Constitutional right to a speedy trial guaranteed by the Sixth Amendment, *U.S. v. Palermo* 27 F.R.D. 393 at 394 (1961).

Thus the Court in dismissing the case upon the ground of unreasonable delay in bringing the defendant to trial after it had found that the defendant had been deprived of his right to a speedy trial pursuant to the Sixth Amendment of the Constitution of the United States, was merely implementing the Sixth Amendment by using Rule 48(b); thus pursuant to the finding of the denial of the right to a speedy trial under the Sixth Amendment, Rule 48(b) was used to dismiss the case (TR 1-73).

The order of December 14, 1964 (TR 1-103) denying the motion to dismiss the indictment with prejudice seems to be based on the distinction between the dismissal of a failure to prosecute rather than a dismissal based on the finding of a denial of a speedy trial pursuant to the Sixth Amendment.

At the outset it should be stated, that the order of July 28, 1964 was not that it was dismissed on the Government's failure to prosecute, but it was dismissed upon the grounds of unreasonable delay in bringing the defendant to trial *after* there had been a finding that the defendant had been deprived of his right to a speedy trial pursuant to the Sixth Amendment of the Constitution of the United States (TR 1-73). Thus it is the defendants position that the deprivation of the rights pursuant to the speedy trial is synonymous with the dismissal upon the ground of unreasonable delay in bringing the defendant to trial (TR 1-73).

State courts have a long history of holding that when the first indictment is dismissed for reasons making effective the Constitutional guarantee of a speedy trial, a detention or trial under a second indictment for the same offense is illegal, *People ex rel Nagel v. Heider et al,* 80 N.E. 291, 225 Ill. 347 (1907).

There the Court said:

> "When a person tried for a crime brings himself within the provisions of the Statute he is entitled to be set at liberty and cannot afterward be committed or held for the same offense when charged therewith by a second indictment. *Brooks vs. People* 88 Ill., 327. In that case, it was considered that any other construction would open the way for a complete evasion of the Statute, which of course, is plainly apparent. The provision of the Constitution can only be given its legitimate affect by holding that a person once discharged is entitled to immunity from further prosecution for the same offense, and that construction was again adopted in the

> case of *Newlin vs. People* 221 Ill., 166, 77 Northeast 529. It is true as said by the attorney general, that the affect of such a construction might be to bar a prosecution of one guilty of violation of the Criminal Law, but it does not follow that the Constitution and Statute should not be obeyed. It might with equal propriety be argued that the Statute of Limitations as to prosecutions for criminal offenses should not be enforced for the same reason. The detention of the relator under the second indictment for the same offense for which he had been committed and indicted was illegal."

An excellent history of the Constitutional right to a speedy trial is contained in *Petition of Provoo* 17 F.R.D. 183, at p. 196.

There the Court said:

> "The right to a speedy trial is of long standing and has been jealously guarded over the centuries."

We take the position to this Court that if it fails to enter a judgment of acquittal, it has in effect, nullified the Sixth Amendment as it applies to this defendant.

The issue can be quite simply stated—can the Government re-indict when the prior indictment has been dismissed after there has been a finding that the defendant's rights to a speedy trial have been abrogated and violated within the meaning of the Sixth Amendment to the Constitution of the United States?

This exact factual question has yet to be placed before a United States Circuit Court of Appeals, nor is there any authority truly on all fours with the fact situation here in any of the Federal District Courts. A general outline of the law in the question may be found at 50 A.L.R. 2d 943. That annotation contains essentially an analysis of the State Court rulings which go off in three areas.

Some states have specific statutes that permit the refiling of an indictment when a trial has not been held on the previous indictment within the prescribed time period.

Other states have statutes specifically stating that the accused shall be acquitted of the offense in the event he is not brought to trial within a prescribed time period. In the states which do not have statutes, the Courts have held both ways. 50 A.L.R. 2d, pages 962 and 963.

Although the facts as presented in this case were not before the Court, the question has been ruled upon quite recently in the case of *Mann v. U. S.*, 304 Fed. 2d 394 (C.A.D.C. 1962). In that case the indictment was dismissed for want of prosecution and the Court held that when a case is dismissed for want of prosecution, it may be re-filed. Counsel for the appellant maintained that the defendant had been denied the right to a speedy trial. The Court rejected this claim. The Court went on to say that in the event there had been a finding of the denial of a right to speedy trial, then the proper remedy is dismissal and this dismissal would be a bar to a subsequent prosecution. The Court said at page 397:

> "We also agree that a dismissal based on a finding that the constitutional right to a speedy trial has been denied bars all further prosecution of the accused for the same offense. While there appears to be no express articulation of the rule in the reported decisions, it is the unspoken premise of all the cases involving the speedy trial clause. (Footnote 6—indeed, if it were otherwise, it is hard to understand why the government would ever appeal from the dismissal of an indictment, rather than simply re-indict). *It is, moreover, a necessary rule if the constitutional guarantee is not to be washed away in the dirty water of the first prosecution, leaving the government free to begin anew with clean hands.*" (Emphasis Supplied.)

The *Mann* case, supra, appeared to be the only Federal case close to point, however, the *District of Columbia v. Healy,* (Municipal Court of Appeals for the District of Columbia, 1960) at 160 Atl. 2d 800, has ruled that in the absence of a statute, a dismissal amounts to a bar to a subsequent prosecution. There the Court commented:

> "If the Government may proceed with a second information, the delay is simply compounded."

There appears to be confusion among the states involving the right of a government to re-indict a defendant subsequent to the original indictment being denied on the ground that defendant was denied his constitutional right to speedy trial. This confusion may exist as a result of three widely held concepts: the Statute of Limitations, the right to a speedy trial as guaranteed by the Constitution, and the right not to be placed in jeopardy twice for the same offense. These concepts have a common thread running through them, namely, that the government has only one shot at a defendant and that the defendant should have the opportunity to prepare his case within a certain time period.

This, of course, places a requirement upon the prosecution, namely, to diligently and expeditiously perform their duties without delay. The distinction between these three principles, while sometimes nebulous, is in reality quite different, especially at the inception of its application.

The Statute of Limitations limits the time within which an accused may be charged with an offense, and the State may not indict after the statute has run. The basis underlying the Statute of Limitations is unreasonable delay. The same principle of unreasonable delay is embodied in the speedy trial concept of the Sixth Amendment, however, it

does not come into effect until after an indictment. Strangely enough, although the speedy trial concept is closer to the Statute of Limitations, it is the double jeopardy principle which is most often confused with the speedy trial concept.

The double jeopardy theory does not become applicable until there has once been jeopardy in the form of a jury being impaneled and sworn. Thus the Statute of Limitations is operative prior to indictment, speedy trial remedy is operative prior to trial but subsequent to indictment, and the double jeopardy remedy is used after a plea or a trial has begun. In the absence of Statutes prohibiting the re-filing of an indictment after a dismissal, Courts which hold that the indictment may be re-filed generally use the reasoning that the defendant has not been put in jeopardy. *Ex Parte Clarke*, 54 Cal. 412 is a good example of the specious reasoning used by Courts allowing re-filing of indictment after the prior indictment has been dismissed. What that case really held and what the Government must in good faith contend in opposition to this brief is: that there is a remedy for a violation of the Statute of Limitations and double jeopardy but there is no remedy if the defendant is denied the right to a speedy trial because the Government may merely re-file if the Statute of Limitations has not run. We make the forthright assertion that it would be downright tyranny to allow the Government a second chance to clang shut the prison gates on the defendant after the trial Court has held that the Government itself has violated the Sixth Amendment of the Constitution to the detriment of the defendant.

THEREFORE, we request that this Court enforce the remedy for the Government's violation of the Sixth Amendment and enter a judgment of acquittal as to all counts.

II. The Refusal of the District Court to Instruct the Jury on the Defendant's Failure to Testify Was Prejudicial Error

The Court was requested to give an instruction that the defendant does not have to take the stand and this can't be held against him, etc. (Court Ex 7).

The Court refused to give this instruction.

The facts in *Bruno v. United States* 308 U.S. 299, (Sup. Ct. 1939), are so close to the facts in the case at bar that the defendant-appellant relies exclusively upon the *Bruno* case.

Here the Court said:

> "Upon receipt of counsel's note during the argument . . . I attempted to cover counsel's position in the note by the addition of the words at the end of . . . 'including his own testimony' which was related to the fact that the defendant was not required to place any evidence at all in the case .... (1285)."

In the *Bruno* case, Supra at page 199, the Court gave a different instruction which included:

> "It is the privilege of a defendant to testify as a witness if and only when, he so elects; ...."

Thus the trial Court in *Bruno* went further than the trial Court in this case.

In *Bruno* as in the case at bar, the trial Court was of the opinion the topic was covered, *Bruno supra,* P. 298, case at bar P. 1285.

The Court in *Bruno Supra* held that the defendant had the indefeasible right to have the jury told in substance what he asked the judge to tell it; and furthermore that the failure to so instruct was not mere technical error but automatically reversible.

We request that this Court rule that it was error not to give the appellant's requested instruction and therefore, reverse and remand the case for new trial.

CONCLUSION

The appellant respectfully requests that this Court enter a judgment of acquittal on Counts 1, 2, 3, 4, 5, 6, 7, 9, 10, 11 and 12 on the grounds that the Government may not refile an indictment once it has been dismissed on the grounds of a denial of speedy trial pursuant to the Sixth Amendment to the Constitution; and thereby further abuse the Constitutional rights of the appellant.

In the alternative, the appellant respectfully requests the Court to reverse and remand this case for new trial on all counts as a result of the prejudicial error caused by the trial Court's failure and refusal to properly instruct the jury as to the defendant's failure to testify.

Sheldon Green
Attorney for the Appellant

CERTIFICATE

I certify that in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion the foregoing Brief is in full compliance with those rules.

Sheldon Green

Appendix

Exhibit	Marked	Admitted
Courts No. 7	1284	1286